NO. 84-1139

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Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES D. BRENNAN, GERALD T. GRIMALDI, COURTLAND J. JONES, GEORGE C. MOORE and GEROULD W. PANGBURN,

Petitioners,

vs.

TINA HOBSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether federal officials should be given blanket immunity for their intentional and knowing violation of First Amendment rights simply because their actions were carried out with the approval of higher federal officials in the FBI.

2. Whether a conspiracy by federal officials to discredit black leaders, to thwart the development of new black leaders, and to prevent the coalition of black and white civil rights and peace groups can reasonably be considered a purely politically-motivated conspiracy and not race-oriented.

3. Whether the jury was properly instructed and there was sufficient evidence to sustain its conclusion regarding the entitlement of these FBI officials to official immunity for the injuries they caused.

4. Whether there was sufficient evidence to support the finding that these defendants or their co-conspirators, acted to deliberately conceal from the plaintiffs the tort being committed.

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COUNTER-STATEMENT

This case began nine years ago when a number of Washington, D.C. anti-war and civil rights activists became concerned, as a result of revelations in the press and in congressional hearings, that their organizations had been the targets of a previously secret FBI operation known as COINTELPRO (counterintelligence program).

COINTELPRO was not a law enforcement program. Its goal, explicitly stated in

internal FBI documents, was "to expose, disrupt and otherwise neutralize the activities" of those opposed to the U.S. involvement in Vietnam, loosely termed the New Left, and "to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalists," a term the FBI employed broadly to include virtually any outspoken black civil rights activists.

While these general goals were revealed in congressional investigations held in 1975 and 1976, it remained to be proven what actual harm had been done to the plaintiffs politically active in Washington, D.C. in the peace and civil rights movements. This lawsuit was filed in July, 1976.

Several years of discovery ensued in which plaintiffs tried to obtain their FBI files in order to learn what tactics had been employed against them and who

was responsible. Understandably, the defendants resisted every effort to obtain documentary evidence not already public, claiming the state secret or informer's privilege for large portions of the FBI files on plaintiffs. After taking many depositions, plaintiffs eventually were able to identify those key officials in the headquarters or field office of the FBI who had primary responsibility for the execution of COINTELPRO activities against them. Other agents, whose involvement was only peripheral, were dismissed voluntarily before trial.

Those FBI officials who remained as defendants at the time of trial were not, therefore, arbitrarily selected to serve as scapegoats for the "sins of the many" (Pet. Brief at 7) but were each centrally involved. Brennan and Moore, for example, were the national directors of

COINTELPRO actions against the New Left and black "nationalists." They had authority to approve or disapprove specific proposed counterintelligence tactics. Jones had similar authority for the entire Washington, D.C. field office; he was the liaison between headquarters and local efforts. Grimaldi and Pangburn were top agents in the "New Left" and "black nationalists" squads in the Washington field office. They were in charge of the informers sent in to "disrupt and discredit" plaintiffs' organizations and helped plan and execute specific operations directed at plaintiffs.

During a three-week jury trial, at which over 30 witnesses testified and hundreds of pages of documentary evidence, largely internal FBI memoranda, were introduced, the FBI defendants attempted to minimize their personal

involvement, explaining away their signatures on key documents as mere formalities. Some effort was made to justify COINTELPRO as an effort to prevent violence but this failed utterly as the evidence revealed that far from preventing violence, the defendants had hoped to incite violence and confrontation. Among the actions directed at plaintiffs were the following:

> -- the printing and circulation of a forged racially inflammatory leaflet designed to set the black groups against the white groups;
>
> -- the deliberate disruption of radio communications at a lawful demonstration so that peace parade marshals would have trouble directing the crowd;
>
> -- forging false housing forms used by plaintiffs to provide overnight lodging to out-of-town peace marchers so that visitors were sent to non-existent addresses.

The defendants acknowledged that these and other actions were directed at disrupting plaintiffs' groups which were known to be peaceful and events for which

permission had been obtained but justified such "counterintelligence" activity on the grounds that even a peaceful, lawful demonstration provides an opportunity for violence.

After deliberating for several days, the jury rendered its verdicts on detailed special verdict forms reviewed by all parties. The jury excused some metropolitan police defendants on immunity and statute of limitations grounds but returned verdicts against all other defendants in favor of eight of the nine plaintiffs. The amount of compensatory and punitive damages awarded varied among the parties and reflected the evidence.

The verdicts were then subject to careful scrutiny by the trial court in acting on post-trial motions for judgment notwithstanding the verdict. In a lengthy opinion the trial court found there was sufficient evidence to sustain

all findings of liability but reversed the award of punitive damages against the two top-ranking metropolitan police defendants, saying their negligent failure to safeguard against constitutional abuses was not enough to warrant punitive damages.

The issue of official immunity, the relevance of Harlow v. Fitzgerald, 457 U.S. 800 (1982), the finding of conspiratorial liability, the instructions and evidence on the statute of limitations -- in short, all the issues raised here -- were first addressed in the District Court's post-trial decision.

These issues were again revisited, even more thoroughly, by the Court of Appeals in a unanimous panel decision (Judges Edwards, Scalia and Starr) over 100 pages in length. The Court of Appeals reversed the District Court on the sufficiency of the evidence against

the metropolitan police defendants and overturned the awards against three plaintiffs on statute of limitations grounds but it had no hesitation in affirming the finding of liability against the five FBI petitioners.

Having failed twice to set aside the verdicts on the grounds of insufficient evidence, the FBI defendants sought rehearing and hearing en banc saying for the first time that even if they were personally responsible they had been acting pursuant to orders from superiors within the FBI and should be completely immune on the "superior orders" defense. The Court of Appeals, in denying rehearing or hearing en banc to both sides, wrote a per curiam decision taking special note of the above argument and rejecting it on both factual and legal grounds. This petition then followed.

REASONS FOR DENYING THE WRIT

The record in this case presents dramatic facts and colorful parties but the legal issues involved are routine doctrines of tort and evidentiary law in the context of an action for damages for injury to First Amendment rights. All of the arguments raised by petitioners have already been carefully considered and rejected below both by the trial court, by the panel of the Court of Appeals and again in an unreported *per curiam* decision denying the FBI defendants' motion for rehearing *en banc*.

Arguments below, both post-trial and again on appeal, centered on questions of fact: the sufficiency of the evidence to show each defendant's involvement in an improper scheme to thwart First Amendment rights and the facts surrounding the statute of limitations, *viz*. to what extent were plaintiffs actually deceived

by the FBI defendants' efforts at secrecy. In an effort to cast these difficult but traditionally not "cert"-worthy matters in a significant light, the petitioners have gravely overstated and, in some instances, misconstrued the proceedings below.

I

THE JURY'S FINDING OF CONSPIRATORIAL LIABILITY FOR EACH OF THE PETITIONERS WAS BASED ON SPECIFIC INSTRUCTIONS REQUIRING PROOF OF INDIVIDUAL KNOWLEDGE AND PARTICIPATION AND WAS PROPERLY AFFIRMED BY ALL COURTS BELOW. THERE WAS NO OBJECTION BELOW TO THE JURY INSTRUCTIONS

The petitioners' suggestion that their liability in this case rests on a finding that COINTELPRO was a conspiracy and they were liable merely as FBI employees assigned to the program is simply wrong. (See jury instructions, Appendix.) Nowhere does the District Court or the Court of Appeals characterize COINTELPRO as an ipso facto

conspiracy. The District Court took great pains to instruct the jury that it had to find that each defendant had been aware of a plan to thwart First Amendment rights and had acted in furtherance of the improper goal. Contrary to the petitioners' assertion (Pet. Brief at 7), the jury was instructed that agreement ("a meeting of the minds") was necessary as to each individual defendant to find liability.

Moreover, the trial court specifically instructed the jury that the fact the defendants were employed at the FBI was "not, standing alone, proof of a conspiracy. . .". (Pet. Brief,App. 146a.) The testimony and documentary evidence during the three-week trial was very much directed at establishing the particular involvement of each defendant in the clearly unlawful aspects of COINTELPRO, at showing their involvement

in planning, approving and executing what petitioners gingerly describe as the "excesses" of the program.

No defendant objected to the jury instructions on conspiratorial liability which followed long-established law.

What the FBI petitioners are actually seeking here is an opportunity to argue that <u>despite</u> their personal and knowing participation in a clearly unconstitutional adventure, they should be held harmless. In effect, they seek absolute immunity for personal and knowing participation in an unlawful conspiracy.

The position of the FBI defendants during trial was quite different from their position here. At trial, the FBI officials denied as a matter of fact any personal involvement in COINTELPRO, at least as if effected these plaintiffs. It was only after trial and the appeal,

when their denials were unavailing, that the defendants first raised in their motion for rehearing en banc their "superior orders" or Eichmann defense. The Court of Appeals, in its per curiam decision denying rehearing, noted this change in position and commented:

> In its most extreme form, this argument amounts to a contention that obedience to higher authority should excuse disobedience to the law, no matter how central the law is to the preservation of citizens' rights. We have no hesitation in rejecting this argument.

(Pet. Brief, App. 198a.) In addition, the Court also noted, these federal agents were certainly not without responsibility for the illegal aspects of the program.

II

THE DEFENSE OF OFFICIAL IMMUNITY WAS CONSIDERED FOR EACH DEFENDANT UNDER PROPER INSTRUCTIONS AND THE JURY'S FINDINGS OF LIABILITY HAVE BEEN CAREFULLY REVIEWED AND AFFIRMED

The petitioners' arguments regarding the treatment of the immunity defense (Pet. Brief 11-15) are really a restatement of the same complaint made in regard to their conspiracy liability. They claim that they were deprived an individualized determination of their right to official immunity but they cite no jury instruction or jury finding to support this surprising assertion. The jury forms, although not included in petitioners' Appendix, are reproduced as an appendix to the trial court's decision in the published decision at 556 F.Supp at 1196 and clearly show that the special verdict form required individual determination as to the immunity of each defendant. So did the jury instructions.

(App., A2.) Indeed, the jury excused some defendants on immunity grounds. (Pet. Brief, App.. at 165A-166A, n. 31.)

If the Court of Appeals opinion speaks of the defendants as a group it is simply for convenience because their defenses were the same, not because the court made some improper collective analysis of immunity. Similarly, the decisions below discuss the nature of the FBI's COINTELPRO not because either court believed immunity is granted vel non to a particular government program, but because the defendants chose to defend their actions by pointing to what they claimed were the legitimate and benign goals of COINTELPRO -- to prevent violence by opponents of government policy.

To counter this defense and to establish as a matter of fact that the defendants, individually, had to have known such was not the primary purpose of

COINTELPRO, the plaintiffs introduced documents, many signed by these defendants, stating that the purpose of COINTELPRO was to disrupt and neutralize group which the defendants knew were peaceful. Thus the nature of COINTELPRO was an important issue of fact.

It is a misconstruction of the record to suggest as petitioners do that the FBI defendants' immunity turned solely on the nature of COINTELPRO. Although obviously that was a relevant factual consideration, the key issue was each defendant's knowledge of and participation in its improper activities. The individualized determination of this issue was made by the jury and decided against them.

III

THE RECORD BELOW AMPLY DEMONSTRATES A CONSPIRACY DIRECTED AT BLACK CIVIL RIGHTS GROUPS AND AT WHITE GROUPS ATTEMPTING TO FORM A COALITION WITH THEM AND THUS FALLS SQUARELY WITHIN THE CORE OF 42 U.S.C. 1985(3) REGARDLESS OF WHETHER THE CONSPIRACY IS LABELED "POLITICAL" OR "RACIAL" IN ITS MOTIVATION

The objection the petitioners are now making to the wording of the jury instruction on section 1985(3) conspiracy liability -- the use of the word "political" rather than "racial" to describe the animus -- was never made at trial and hence must be deemed waived under Fed. R. Civ. Pro. 51. It was not made at trial for a very simple reason: it made no difference in this record whether the animus was described as political or racial since the political thrust was rooted in racial animus.

Racial animus informed the FBI officials' methods and goals. Defendants

Jones and Moore approved false press releases for distribution which were sent out to "friendly media" sources and were intended "to tarnish the reputation of Julius Hobson," a local black civil rights leader and late husband of respondent Tina Hobson. The press releases portrayed Hobson as an "Uncle Tom" and were designed, according to FBI interoffice memo, to "cause Black leaders to view each other with suspicion." (Pltf. Trial Exh. 21-2.)

FBI documents introduced at trial and either written or approved by defendants explicitly stated that the goal was to prevent a coalition from forming between local black civil rights groups and the peace movement. To this end, for example, defendants Brennan and Moore approved a scheme to foster racial animosity between the two camps by sending a forged letter to the local

leader of the November, 1979 peace marches saying the black community of Washington, D.C. "demands" payment of $25,000 as the price for its support for the march.

The defendants then prepared what purported to be the response of the predominately white peace movement leaders and mailed it to key local blacks. On a paper bearing a crude drawing of a black monkey with a banana, the leaflet said in part:

> [If] you must get something in return for their non-violence towards the NMC [the peace organization] during these days of demonstration, give them BANANAS -- all they can eat. . .We consider you [a local black leader] and your kind as black bandits and the most dangerous of the elements eating away at the movement. The Steering Committee of the NMC can feed you all the shit they want, Mr. Moore, but lip service isn't money. None that you'll ever see. Suck on your bananas, brother, and some day you might learn how to make a fire or build a wheel.

The record in this case is replete with similar instances of efforts to discredit black leaders qua blacks and to stir up racial hatred.

While it is correct that the term "political purposes and activities" was used in the jury instructions, rather than "political or racial," it was used without objection by any defendant. United Brotherhood of Carpenters and Joiners v. Scott, 103 S.Ct. 3352 (1983), questioned in dicta whether a purely politically-motivated conspiracy, as distinguished from one with an underlying racial animus, as in this case, could be actionable under 42 U.S.C. §1985(3).[1] It

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[1]In fact, United Brotherhood effected no change in the law regarding racially-motivated conspiracies or conspiracies, such as here, where racial and political animus are interwoven. See Griffin v. Breckinridge, 403 U.S. 88 (1971). United Brotherhood dealt with a

(Footnote Continued)

is on this dicta, inapplicable in any event to the facts here, that petitioners rely.

This entire issue was thoroughly treated by the Court of Appeals below which found that the racial overtones of the FBI program were so strong that the facts fit "solidly within even the narrowest reading of section 1985(3)." (Pet. Brief, App. 40a.) There was, therefore, no conceivable prejudice, nor do petitioners claim any, in the use of the term "political" rather than "racial" in describing the motivation for the animus.

IV

THE APPLICATION OF THE STATUTE OF LIMITATIONS PRESENTS FACTUAL QUESTIONS PROPERLY DECIDED BELOW AND INVOLVED NO IMPORTANT FEDERAL QUESTION

(Footnote Continued)
conspiracy among private parties which had at its base animus neither racial nor political but economic.

The petitioners raise two issues with respect to the application of the statute of limitations to this case. First they claim that the courts below did not follow Wood v. Carpenter, 101 U.S. 135 (1879), an early decision of this Court with regard to the proof necessary to show fraudulent concealment. (Pet. Brief at 22). Neither issue warrants granting certiorari; both were exhaustively treated below.

Wood v. Carpenter found no fraudulent concealment in the acts of a judgment-debtor to convey his property beyond the reach of his judgment creditor where the real estate conveyances were recorded in the public registry. Although the judgment-debtor kept quiet about the conveyances until his judgment-creditor tried to execute his judgment (some 12 years after getting judgment, a fact the Court found significant), the Court held

that in such a case "mere silence" is not enough to give rise to fraudulent concealment and toll the limitations period. The fraud in Wood had not really been concealed.

It should be clear from this brief explanation of why Wood does not govern this case as the court below properly held. The facts here involve not "mere silence" about otherwise discoverable facts but instead active and deliberate concealment; viz: the use of unwatermarked paper to send inflammatory letters, telephone calls to plaintiff's employers made under assumed identities, explicit caveats in virtually every approved COINTELPRO plan to make sure the project could not be traced to the Bureau, and attendance at plaintiffs' meetings under false identities. (Pet. Brief, App. 66a-67a.)

In light of this record, the trial court properly declined to give a requested instruction that "mere silence" by a defendant is not fraudulent or deliberate concealment because the evidence did not generate the basis for such an instruction and it would have confused the jury.

Contrary to petitioners' assertion that the plaintiffs were not required to show affirmative acts of concealment, the trial court specifically instructed the jury that it had to find "deliberate concealment" meaning "that defendant or a conspiracy to which a defendant belonged deliberately kept information away from a plaintiff which was material to that plaintiff's claim." (Jury instructions quoted in part at Pet. Brief, App. 156.) The Court of Appeals thoroughly considered this very issue and found not "mere silence" about a self-concealing

wrong, as petitioners claim, but ample evidence of affirmative acts taken during the conspiracy itself to assure that the plaintiffs would remain ignorant not only of who was working against them but also of what exactly was being done. The whole point of the defendants' actions was to make the plaintiffs believe the disagreements and difficulties they were experiencing were internal and to turn the plaintiffs against each other.

Petitioners claim of novelty for the Court of Appeals' decision, clearly intended to alarm, is based on an inaccurate description of the holding. Neither court below ever held that the limitations period was tolled until plaintiffs were "given notice" of the conspiracy. What the courts below held, in accord with established law, was that the plaintiffs had the burden of showing deliberate concealment of material facts

which prevented their filing suit earlier and, if that difficult hurdle was surmounted, then the defendants could try to show that despite the concealment, plaintiffs could have with due diligence discovered the facts necessary to sue.[2]

The holding hardly allows the plaintiffs to sleep on their claims until

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[2] Gruenwald v. U.S., 353 U.S. 391 (1957), on which petitioners rely heavily, is clearly inapposite. It does not involve the doctrine of fraudulent concealment. It was a criminal case in which the Court, for policy reasons, declined to extend the already sweeping scope of the conspiracy doctrine to include as part of the conspiracy acts of concealment taken after the crime itself had been completed. Since all crimes are committed in secret and efforts at concealment are the rule, the Court required proof that the agreement to continue to conceal had been a part of the original conspiratorial intent in order for criminal responsibility to attach. Civil wrongs, on the other hand, are not necessarily hidden but when the cause of action itself has been concealed, the statute is tolled. Richards v. Mileski, 662 F.2d 65 (1981); Fitzgerald v. Seamens, 553 F.2d 220 (1977).

notice is given them. Evidence of this is the fact that the Court of Appeals reversed the judgments in favor of three plaintiffs on the grounds that they had, as a result of reading a newspaper article about FBI COINTELPRO activities, had to sue, despite the fact that efforts at concealment and denial continued after the article appeared.

CONCLUSION

For the foregoing reasons, the respondents respectfully urge the Court to deny the petition for certiorari.

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APPENDIX

EXCERPTS FROM JURY INSTRUCTIONS RELATING TO NECESSITY FOR INDIVIDUALIZED DETERMINATION FOR EACH DEFENDANT

...Now, in this case, as you know, there are several plaintiffs and several defendants. The case of each is separate from and independent of that of the other. The law permits them to join as plaintiffs here solely because their claims involve the same subject matter. However, their rights, if any, are separate, not joined. The instructions I give you apply equally to each plaintiff unless otherwise stated, and you will determine each plaintiff's case independently and as a separate action and return a separate verdict in each case for the plaintiff and for the defendants. This will be reflected in, as I think I told you -- there will be a verdict form, a separate verdict form, for each plaintiff on which there are listed all the defendants.

You are instructed that while there are a number of defendants in this action, it does not follow that if one is liable, all the rest are liable, or any of the rest are liable. Each is entitled to a fair consideration of his or her own defense, and it is not to be prejudiced by the fact, if it should become a fact, that you may find against one or the other of them. The general instructions I give you govern the case as to each defendant to the same effect as if that defendant were the only defendant in the case.

If you find that no defendant is liable, your verdict should be in favor of all the defendants against the plaintiffs. If you should find that only one defendant is liable, then your verdict should be in favor of the plaintiff against that defendant alone, and so forth.

...The plaintiffs here claim that the defendants injured rights guaranteed to the plaintiffs by the First Amendment of the United States Constitution to express freely their political views and attitudes, and to debate publicly issues, and to assemble publicly, and to petition the government for redress of grievances. These are among the so-called First Amendment rights, along with the freedom of the press and freedom of religion. The government and people working for the government may not interfere with these rights except under certain very limited conditions and in certain very limited ways. Therefore, the questions before you basically are whether the defendants, acting individually or as alleged co-conspirators -- a term that I will explain to you further -- injured a plaintiff by preventing that plaintiff from exercising, or by impeding that

plaintiff in the exercise, or rights guaranteed by the First Amendment to assemble at a particular time and place, or to associate with one or more persons generally to further political aims and to engage in political activity.

As I have stated, people working for the government may lawfully interfere with speech, assembly, and association that have a political purpose, but only in certain very limited conditions and in very limited ways. For example, government officials have a very important duty by using reasonable means to prevent domestic violence to persons and property; to prevent interruption of orderly activities of a community, such as traffic; to protect the nation from foreign enemies; and to investigate and prevent crime.

Defendants claim that if they committed the acts about which plaintiffs

claim, they did so for those purposes. It's necessary for you to decide, therefore, whether a reasonable person in a defendant's situation could believe reasonably that his conduct would not impede a plaintiff's exercise of First Amendment rights, or that in so impeding, the defendant was nevertheless acting with a reasonable good faith believe that his conduct was lawful.

Finally, if you find that a defendant's conduct injured a plaintiff's First Amendment rights, and that conduct was not justified, you must proceed to determine whether that defendant or the conspiracy, which you may find or may not find, but the conspiracy to which he allegedly belonged deliberately concealed from that plaintiff knowledge of important facts about that plaintiff's case in such a way that that plaintiff could not have discovered by the exercise of due

diligence enough facts to file a suit in court in the time allowed by the statute of limitations for filing a suit.